

boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

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Dim Lighting and Unavoidability Do Not Necessarily Make a Condition Unreasonably Dangerous

By Jack Weston

In *Klos v Karlman Food Servs, Inc*, an unpublished decision of the Michigan Court of Appeals, Plaintiff was injured when she tripped on floor molding while she was returning to her table from the dance floor in Defendant's club. Plaintiff sued under a premises liability theory, alleging that the club's dim lighting and crowded conditions made the molding difficult to see. Plaintiff argued that the molding was unavoidable and unreasonably dangerous since she had to cross it to go to and from the dance floor.

On the night of the accident, Plaintiff went to Defendant's club at 9:00 p.m. with several of her friends. Plaintiff first used the dance floor around 10:00 p.m. and returned to her seat without incident. She went back to the dance floor at approximately 1:30 a.m. As she returned to her seat, she tripped on a piece of floor molding, fell and was injured. The black molding at issue was two inches wide and one-eighth of an inch high. It was bordered by blue carpet on one side and by light-colored tile on the other side. Plaintiff admitted that she knew the molding was present before her accident and that she had safely negotiated the molding the first time she danced that night. However, Plaintiff argued that the dim lighting and crowded conditions in the club made the molding difficult to see.

Plaintiff appealed the trial court's dismissal of the case. On appeal, the Court of Appeals held that a premises possessor generally owes no duty to protect business visitors ("invitees") from open and obvious dangers. A danger is open and obvious if an average user with ordinary intelligence would have been able to discover the danger upon casual inspection. In determining whether a condition is open and obvious, courts should consider whether there are special aspects or conditions that make an otherwise open and obvious risk unreasonably dangerous. These "special aspects" exist if the condition is unavoidable or presents a high likelihood of severe harm. If a special aspect is found to exist, the possessor of the property has a duty to act reasonably to protect invitees from the hazard created by that dangerous

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Although *Klos* is an unpublished decision and not binding on lower courts, it presents another example of the application of the open and obvious doctrine to everyday occurrences. The Michigan Court of Appeals has once again shown that it is not going to reward people for failing to take appropriate care for their own safety, especially with respect to readily observable and avoidable everyday conditions. *Klos* also supports the position that a person cannot simply create a special aspect by alleging unavoidability, or by making the condition unavoidable by crossing it the first time, thereby necessitating that the person must cross it a second time to leave.

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condition despite its open and obvious nature. Plaintiff alleged that, because of dim lighting and crowded conditions, the molding was difficult to see, and was therefore not an open and obvious condition. Further, Plaintiff argued that the condition was unavoidable and unreasonably dangerous since she had to cross it to get to and from the dance floor.

The Court of Appeals upheld the trial court, concluding that the molding was an open and obvious condition. Noting that the molding's color contrasted with the adjacent flooring, the Court held that it would be visible upon casual observation to anyone who looked down at the floor. Furthermore, the Court noted that Plaintiff had previously negotiated the molding safely and that she admittedly knew the molding was there. The Court further held that there were no special aspects that made the molding unreasonably dangerous. The dim lighting, overcrowded conditions and location of the molding did not render it unavoidable. Plaintiff could have simply walked over it as she had previously done. The alleged special aspects also did not present a high likelihood of severe harm, as the molding presented only the ordinary type of risk that people routinely encounter every day, especially at popular and dimly-lit clubs with dance floors.

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